Flatbush Manor Care Center and Fair Management Consulting Corp. *and* 1115 Nursing Home and Service Employees Union, Division of 1115 District Council, AFL–CIO. Cases 29–CA–14844, 29–CA–15253, and 29–CA–15376

September 29, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

On May 4, 1994, Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondents filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Flatbush Manor Care Center and Fair Management Consulting Corporation, Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] No exceptions were filed to the judge's findings that the Respondents violated Sec. 8(a)(5) and (1) by failing to make contractually required contributions to the Union's legal services fund and welfare trust fund, and by failing to provide information requested by the Union.

The Respondents excepted to the judge's conclusion that they violated Sec. 8(a)(5) and (1) by failing to make lump-sum bonus payments to certain bargaining unit employees, as mandated by the parties' January 5, 1988 memorandum of agreement. The judge found, and we agree, that certain preliminary language in the parties' subsequent March 16, 1990 memorandum of agreement did not constitute a clear and unmistakable waiver of the Union's statutory right with respect to the contractual bonus payments. The Respondents, citing, e.g., *NCR Corp.*, 271 NLRB 1212 (1984), contend that they had a ''sound arguable basis'' for an interpretation of the relevant language of the March 16, 1990 memorandum canceling, or settling, the bonus obligation set forth in the earlier memorandum agreement, and that this is sufficient to mandate dismissal of the unfair labor practice allegation. We find *NCR* inapplicable here. It concerned a dispute that was ''solely one of contract interpretation.'' The present case, in contrast, concerns an employer's refusal to make payments that had indisputably accrued under a collective-bargaining agreement—a failure that would ordinarily constitute a violation of Secs. 8(a)(5) and (1) and 8(d) of the Act. *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989). The issue is whether the parties settled that past obligation in the context of a contract reopening, and the judge applied an appropriate standard in deciding that issue.

Saundra Rattner, Esq., for the General Counsel.
Elliot Mandel, Esq. (Kaufman, Naness, Schneider Rosensweig, P.C.), for Respondent Fair Management Consulting Corp.
Jeffrey D. Buss, Esq. (Smith, Buss and Jacobs), for Respondent Flatbush Manor Care Center.
Stuart Weinberger, Esq. (Richard Greenspan, P.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case[1] was tried before me on July 19, 1993, in Brooklyn, New York. The consolidated complaint alleges that the Respondents are a single-integrated enterprise and a single employer within the meaning of the Act, that during the period that Charging Union, 1115 Nursing Home and Service Employees Union, Division of 1115 District Council, AFL–CIO (the Union or Local 1115) was the designated exclusive collective-bargaining representative of its employees in an appropriate unit, Respondents failed and refused to make contractually requested lump-sum bonus payments to certain unit employees, to remit contractually required contributions to the Union's Welfare Trust Fund and Prepaid Legal Service Care Fund, to permit an audit of its books and records, and to furnish the Union with certain information requested by it, all in violation of Section 8(a)(1) and (5) of the Act.[2]

Respondents filed answers denying many of the substantive and conclusionary allegations of the consolidated complaint, subsequently agreeing at the outset of hearing to admit to many allegations but continuing to deny the paragraphs alleging that they committed any violations of the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. General Counsel filed a posthearing letter brief. All arguments made at hearing and in the posthearing brief have been carefully considered. On the entire record in the case, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent Flatbush Manor Care Center (Respondent Flatbush or Flatbush), a partnership, with its office and place of business located at 2107 Ditmas Avenue, in the Borough of Brooklyn, city and State of New York (the Brooklyn facility), has at all times material here been the licensed operator

[1] The name of the Charging Party has been corrected in accordance with its motion made and granted without objection at the hearing.

[2] On motion made by the Charging Union at opening of hearing to withdraw those portions of charge in the consolidated proceeding, on the basis of which par. 15 was included in the consolidated complaint, alleging physical assaults and threat to deny access to the Brooklyn facility, to a named union agent in violation of Sec. 8(a)(1) of the Act, and counsel for General Counsel having indicated the motion was acceptable to him, I ordered par. 15 withdrawn from the complaint.

of a nursing home, providing health care services and related services. Respondent Fair Management Consulting Corp. (Respondent Fair or Fair), a New York corporation, with its principal office and place of business also located at 2107 Ditmas Avenue, in the Borough of Brooklyn, city and State of New York (the Brooklyn facility), has at all times material been engaged in the business of providing employee staffing, payroll, and other related services to Respondent Flatbush. During 1992, a period representative of their annual operations generally, Respondents Flatbush and Fair, in the course and conduct of their business operations, derived gross revenues in excess of $100,000, Respondent Flatbush purchased and received at its Brooklyn facility medical supplies and other products, goods, and materials valued in excess of $50,000 directly from other enterprises located outside the State of New York, and Respondent Fair purchased and received at its Brooklyn facility goods and materials valued in excess of $5000 directly from other enterprises located outside the State of New York. The Respondents admit, and I find, that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and health care institutions within the meaning of Section 2(14) of the Act.

As earlier noted, the consolidated complaint alleges that the Respondents have been affiliated business enterprises with common officers, owners, directors, management, and supervision, and that by virtue of their business operations described above constitute a single-integrated business enterprise and a single employer within the meaning of the Act. The Respondents joined the General Counsel and the Charging Party in a stipulation providing that whatever the court of final jurisdiction determines in Case 29–RC–7764 on the issue of single employer will be binding on them. In that representation proceeding, on February 11, 1992, the Regional Director issued a Decision and Direction of Election finding, inter alia, that Flatbush and Fair were a single-integrated enterprise and a single employer within the meaning of the Act. In a Supplemental Decision on Objections and Certification of Representative, dated August 5, 1992, in the same case, Regional Director Alvin Blyer dismissed various timely objections filed by various parties including the Charging Union here, to conduct affecting the results of the election held pursuant to his direction of election on March 12, 1992, and certified that a majority of the valid ballots had been cast for Local 1199, Drug, Hospital and Health Care Employees Union, and this labor organization was the exclusive collective-bargaining representative of all full-time and regular part-time employees employed by Flatbush and Fair at their Brooklyn, New York location, with various named exclusions.

Requests for review of the Regional Director's Supplemental Decision on Objections and Certification of Representative were filed by Flatbush, Fair, Intervenors Local 1115 and District 6, International Union of Industrial, Service, Transport and Health Employees, raising, among other matters, objections to the Regional Director's finding of single employer status for Flatbush and Fair. In an Order dated August 19, 1993, the Board denied the requests for review as they raised no substantial issues warranting review. In accordance with the parties' stipulation, and on the basis of the Regional Director's determination, now approved by the Board, I find and conclude that Flatbush and Fair constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

Respondents also admit, and I also find, that the Charging Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondents have admitted, as fact, certain complaint allegations. The following reflects these admissions as supplemented by various other facts undisputed in the record or as stipulated by the parties.

At all times material, until on or about January 3, 1991, all employees employed at Respondents' Brooklyn facility, excluding registered nurses, confidential, office and clerical employees, supervisors, watchmen and guards constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

From on or about January 1982, until on or about January 3, 1991, Local 1115 was the designated and recognized exclusive collective-bargaining representative of the employees in this unit. Such recognition was embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms for the period January 5, 1988, through January 4, 1991, and consists of a collective-bargaining agreement for the period from January 5, 1985, through January 4, 1988, as modified by a memorandum of agreement effective from January 5, 1988, through January 4, 1991, and a second memorandum of agreement dated March 16, 1990.[3]

The collective-bargaining agreement described above, as modified by the memorandum of agreement effective from January 5, 1988, through January 4, 1991, contains, inter alia, a provision requiring Respondents to make lump-sum bonus payments on March 1, 1990, to their blue collar employees in the bargaining unit described who were employed by Respondents during the period from October 29, 1989, through February 28, 1990. The lump-sum payment for full-time employees is described as being equal to $7.50 per week for each full week worked between the dates described. Part-timers shall receive a pro rata amount. It is also noted that, these lump-sum payments shall not be part of a blue collar employee's base salary. This memorandum also provided for a limited reopening for the year commencing January 5, 1990, through January 4, 1991, except with regard to the Respondents' contributions to the Union Welfare Fund.

In the second memorandum of agreement dated March 16, 1990, among other preliminary paragraphs, the parties agreed to the following language:

> WHEREAS, the parties agree that the underlying collective bargaining agreement as modified by the previous Memorandum of Understanding (consisting of 4 pages with 6 paragraphs) survives, and is incorporated herein unless modified below; and the parties agree that this Agreement satisfies all previous obligations arising under the parties previous collective bargaining agreements.

[3] This second memorandum of agreement was erroneously described in the consolidated complaint as admitted by Respondents as having been dated March 6, 1990.

In the body of the second memorandum of agreement itself the parties agree to modify various paragraphs of the earlier memorandum of agreement to provide for wage increases on February 28, September 28, and December 28, 1990, for Blue Collar employees and LPNs (licensed practical nurses); increases in employer contributions to the Local 1115 Employees Union Welfare Trust Fund on the same dates; and to add July Fourth as a paid employee holiday effective July 4, 1990.

The parties agree that since on or about March 1, 1990, and continuing to date, Respondents have failed and refused to make the contractually required lump-sum bonus payments.

With respect to the Union's Welfare Trust Fund and Prepaid Legal Service Care Fund, the Respondents' obligations to make contributions thereto appear in article 10 of the parties' 1982 collective-bargaining agreement, and continued thereafter in all subsequent agreements and memorandum agreements, through January 3, 1991. Also set forth in the original 1982 agreement and continued thereafter under all memorandum agreements through January 3, 1991, is a right of both the Union and the funds to examine the Employer's books and records for the purpose of determining whether the Employer has complied with the provisions of the contract article mandating contributions to the benefit funds. Likewise, the original agreement contained an obligation by the Employer under the union-shop clause which was continuously renewed, to give the Union a list containing the names and home addresses of employees covered by the agreement with category, wages, and dates of hire, and thereafter promptly furnish updates. By the second memorandum of agreement dated March 16, 1990, Respondents' obligations to make contributions to the Union's Welfare Trust Fund had increased by $15 per month from $135 to $150 a month effective February 28, 1990, with another increase of $5 per month effective September 28, 1990, and an increase of $10 per month effective December 28, 1990. The contribution rate required under the Union's Prepaid Legal Service Care Fund was originally set at $5 per month for each covered employee, with the proviso that effective with the payment of additions to the Welfare Trust Fund there shall be $2-per-month increases in the Prepaid Legal Fund contributions.

It appears that commencing with on or about April 1, 1990, when the Welfare Fund contribution rate increased to $150 per month per covered employee, until August 31, 1990, Respondents continued to make monthly payments at the old, $135-per-month rate, and then from September 1, 1990, until the expiration of the last agreement on January 3, 1991, Respondents ceased making any payments to this fund altogether. Commencing on or about September 1, 1990, and until January 3, 1991, Respondents also failed and refused to remit any contractually required contributions to the 1115 Prepaid Legal Services Care Fund.

By various communications and letters the Union made demand of Respondents that the lump-sum payment as well as the delinquencies in contributions to the Welfare Trust Fund and Prepaid Legal Service Care Fund be satisfied.

By mailgram dated April 12, 1990, Raul Aldrich, secretary-treasurer of the Union, advised David Oberlander, assistant administrator of Respondent Fair that ''you have not complied with the Agreement to pay the bonus on March 1, 1990 as required. If this payment is not made immediately, we shall take immediate and appropriate action to enforce compliance.'' By letter reply dated April 25, Arthur Kaufman of the law firm representing Respondents in this proceeding wrote, ''Please be advised that it is my clients' position that the most recent collective-bargaining agreement, agreed upon in February, 1990, modified the previous agreement, and eliminated the lump sum agreement which you claim is due now.'' In a letter dated May 2, 1990, Richard Greenspan, the attorney for the Union, replied to Kaufman, disputing his rejection of the lump-sum obligation. He wrote:

> Your clients' position that the recent agreement modified the previous agreement and eliminated the lump sum payment is erroneous. Monies represented by that lump sum payment were earned prior to the effective date of the extension and, moreover, was due to employees and required to be paid prior to execution of the extension agreement. Demand is renewed for immediate payment of the lump sum monies due to bargaining unit employees.

In a May 3, 1990 memorandum to employees dealing with the Union's claim of failure to pay the bonus, the Respondents characterize the Union's position in the negotiations leading to the March 16, 1990 memorandum of agreement as one in which the Union made clear that their primary objective was to obtain a higher monthly payment to its funds, in lieu of any increased benefits to employees. There are no bonuses provided in the March 16 agreement. In this memorandum, Respondents offer to give the disputed bonus within 3 working days if the Union agrees they will waive any increases in their own welfare fund for the calendar year 1990 over 1989. In a subsequent letter dated July 2, 1990, addressed to Lawrence C. Schoen, Esq., Respondent Flatbush's then receiver appointed by order of the New York State Supreme Court, Kings County, since removed by the Court, Greenspan pressed the employees' claim to the lump-sum amount, asserting that the employer's representatives were seeking to avoid payment of a wage adjustment rightfully due them, as well as having become delinquent in its obligations to the fringe benefit funds, and asking for Schoen's intervention under his then authority.

With respect to the owed fund contributions, by letter dated April 23, 1990, the Welfare Trust Fund Comptroller Ronald Germana informed Arthur Boden, Flatbush administrator, of a $1290 shortage for March in the fund due to Flatbush's not having paid the rate increase of $15 per month. In a subsequent letter dated May 2, Germana demanded payment of $2595 representing April and March delinquencies. Although Respondent later remitted the March delinquency it continued to make payments of contributions at the old $135 rate. Thus, in a November 16, 1990 letter to Boden, the Welfare Trust Fund's systems coordinator, Robert Evans, requested payment of $6000 for the months of April through August 1990, representing the failure to remit the $15,000 difference in rate for those months.

As noted earlier from September 1, 1990, until January 3, 1991, Respondents failed to remit any contractually required contributions to either the Welfare Trust Fund or the Prepaid Legal Service Care Fund.

By identical letters dated September 28, 1990, Michael Sackman, the trustee chairman of the Welfare Trust Fund, and Raul Aldrich, secretary-treasurer of the Union, wrote the Respondents' law firm with reference to Flatbush Nursing Home, informing it that:

> In accordance with our Collective Bargaining Agreement, we are exercising our right to audit your books and records for the purpose of, but not limited to, ascertaining whether you have been making the proper remittance of dues and initiation fees.

The letters went on to request copies of forms WRS-2s filed for the period January 1, 1985, and ending December 31, 1989, and ended by requesting an immediate response in order for the audit to be completed as soon as possible.

In a letter dated October 31, 1990, Arthur Boden, Flatbush administrator, informed Raul Aldrich, who months earlier had sought an audit of its books and records for the same reasons expressed in the September 28 requests:

> As you were previously advised, Flatbush Manor Care Center has no contractual obligation with Local 1115, nor has it ever had any contractual obligation with Local 1115. Flatbush Manor hires contractors to perform its labor services.

Copies of the letter were forwarded to Fair and Attorneys Arthur Kaufman and Richard Greenspan.

Greenspan now responded on behalf of the Union to Boden at Flatbush Manor in a letter dated November 5, 1990. He expressed the Union's position, since in part sustained by the Board, ''that Flatbush Manor is either a single or joint-employer and/or alter ego with any contractor it engages to perform labor services, and, as such, is bound by the terms of the Union's contract and responsible to the employees covered thereby.''

In the next paragraph Greenspan then makes demand that Boden submit the contracts under which the labor service contractor performs work and detailed information concerning the ownership of the facility and the contractor, for the entire period that Boden claims that contractors have provided the labor services. In a separate letter to Arthur Kaufman, dated November 12, 1990, Greenspan expressed his client's position that its bargaining relationship extends to both the ''contractor'' and Flatbush Manor and that, accordingly, any contract made involving this facility is binding on Flatbush Manor as well as any contractor including any successor contractor which may be involved.

Responding to Greenspan's request for information, by letter dated November 20, 1990, Kaufman indicates he cannot respond in so far as the request was directed to Flatbush Manor, but to the extent the request is made to Fair Management, his office does not believe that such issue is relevant to the negotiations at hand. He closes this subject by noting that ''if you choose to pursue such matter, we will allow a court of law to determine if you are entitled to such information.''

In a certified letter dated November 28, 1990, which was received on November 20, Raul Aldrich wrote Fair Management and Flaltbush Manor:

> In accordance with the collective-bargaining agreement, the 1115 Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board requests that the Employer submit the names and addresses of all employees covered by this agreement for the last six months.

The record contains no evidence that Respondents honored this request.

Edith Lohlein, Local 1115 business representative responsible for the Respondents' facility, among others, off and on from 1984 to 1991, described the subject bargaining unit as including blue collar workers and licensed practical nurses. The collective-bargaining relationship between the Union and Respondent Flatbush Manor commenced in 1982.

According to Lohlein, she was present in the building but not present in the room where the negotiations were taking place on March 16, 1990, for the second memorandum of agreement. These negotiations were being held after the due date of March 1, 1990, for payment of the lump-sum amounts in dispute. To her knowledge, neither in her presence nor based on various contracts and arbitration awards which she maintained in a file on the Respondents' facility, was she made aware of any express waiver by the Union of the Respondents' obligation expressed in the memorandum to make payment of the bonuses.

Lohlein testified that the Union made the request to audit Flatbush's books and records to review dues and initiation fee remittances so that it could determine if it was receiving the correct amount of funds—an issue at the time. The Respondents never agreed to the audit or permitted a review of their books and records.

After the Union received Boden's letter of October 31, 1990, advising that Flatbush Manor had no contractual obligations with Local 1115, the Union responded by its counsel's letter dated November 5, 1990, requesting the contract between Flatbush and Fair and their respective ownership of the facility, to resolve the question the employers had raised as to who really was the employer of the unit employees. This information was never provided the Union.

Finally, the Union requested the names and addresses of unit employees for the past 6 months on November 28, 1990, to be sure that it was collecting the right amount of fund and dues contributions. Again, the Respondents never provided this information.

During Lohlein's further examination by union counsel, she testified that during the pendency of the dispute with Respondents regarding their failure to make proper remissions of the contractual amounts of contributions to the respective funds, she visited the facility and informed the employees that the Company was jeopardizing their benefits. The employees were very upset by this disclosure. As to the Union's request for names and addresses, Lohlein testified that she suspected that the Employer was not reporting all the names of employees to the Union and reported this suspicion to the employees. She did a timecard check at the Brooklyn facility and saw names of employees not included in Respondents' statements which accompanied its regular remittances to the Funds and Union. She reported these discrepancies to both the employees and to Respondents' management.

Respondents chose not to cross-examine Lohlein but presented a number of documents in the presentation of their defense, discussed below.

In an order signed by Judge Herbert Kramer of the Supreme Court of the State of New York, County of Kings, on December 1, 1992, in the case of *Bella Oberlander v. Sandos Oberlander*, Index No. 2266/89 the Court, on motion of Richard Greenspan, counsel for certain named trustees of the Local 1115 Welfare Trust Fund and Legal Service Care Fund, ordered that Lawrence C. Schoen, as judicial receiver, pay the sum of $119,000 to the funds, and that the application of the trustees for leave to sue receiver be denied. The order recites that in the application the trustees had sought permission to bring an action against Schoen, as receiver of Flatbush Manor, to recover contributions allegedly owed to the two employee benefit funds pursuant to a collective-bargaining agreement.

Respondent counsel represented that this order disposes of certain monetary claims of 1115's related union welfare fund and legal fund. Union counsel represented that the sum of $1119,000 provided for in the order was paid in a check dated December 10, 1992, which was received by the respective funds a day or so later. Thus, the money which the Union claims it did not receive on behalf of the funds, and which is encompassed by the respective allegations of the consolidated complaint was finally paid as a consequence of an application made in the New York State courts in the proceeding involving the dispute between the partners of Flatbush Manor.

Respondent also produced and included in the record a letter dated June 5, 1990, from Regional Director Blyer to Respondents Flatbush and Fair in one of the three consolidated cases, Case 29–CA–14844, in which the Regional Director informed Respondents that he was declining to issue complaint on the allegation of a refusal to pay the scheduled wage adjustment due to employees on March 1, 1990, in accordance with the Board's arbitration deferral policy as established in *Collyer Insulated Wire*, 192 NLRB 837 (1970); *United Technologies Corp*., 268 NLRB 557 (1984); and *Postal Service*, 270 NLRB 114 (1984).

The Regional Director went on to note that in his view further proceedings on this obligation should be administratively deferred for submission to the grievance-arbitration machinery of the parties' collective-bargaining agreement, and citing, in support, among other reasons that the Union is willing to arbitrate the disputes which underlie this allegation.

Further in the letter, the Regional Director notes his intentions to revoke his decision to defer and to dismiss the charge in the event that the Charging Party fails or refuses to continue to pursue the grievance through the steps of the contract grievance-arbitration procedure, abandons the grievance, or in the event the Charging Party notifies him in writing that it does not intend to pursue this grievance.

Subsequently, by letter dated July 22, 1991, Respondent Fair's attorney Mandel wrote then counsel for General Counsel Elaine Robinson-Fraction confirming his oral advice in which he urged the Region to dismiss the deferred charge since no grievance was filed with his client and no arbitration process ever invoked by the Charging Union.

By letter dated October 20, 1992, Regional Director Blyer inquired of the Union, with copies to Flatbush, Mandel, and Greenspan, as to the status of the dispute underlying the charge in Case 29–CA–14844, and set a deadline of November 3, 1992, for its response.

Then, by letter dated July 1, 1993, Regional Director Blyer notified the Charging Union and Respondents Flatbush and Fair and with copies to the General Counsel's Office of Appeals, and all counsel, that since his decision to defer Case 29–CA–14844 on June 5, 1990, he has ''reconsidered his action in deferring the matter, with respect to the merits of the charge, and in view of the impact of related unfair labor practice charges involving the parties herein in Case Nos. 29–CA–15253 and 29–CA–15376.'' The Regional Director went on to note he was remanding the matter to himself for further processing, revoking his action reflected in his June 5, 1990 letter, and the charge in Case 29–CA–14844 was being processed further. On the same date, the Regional Director signed and issued his order further consolidating cases, consolidated complaint and notice of hearing in the instant proceeding.

Conclusions and Analysis

I turn first to the failure to pay the bonus contained in the 1988 agreement and Respondent's defense that the Union waived any right to the moneys in the March 16, 1990 memorandum agreement.

The governing principle of law is that in order to effectuate the relinquishment of a collective-bargaining right under the provisions of a collective-bargaining agreement, the language must be clear and unmistakable. *Federal Compress & Warehouse Co. v. NLRB*, 398 F.2d 631 (6th Cir. 1968). Put another way, a contractual waiver of a statutory right will not be lightly inferred, but rather must be ''clear and unmistakable.'' *Metropolitan Edison v. NLRB*, 460 U.S. 693, 708 (1983). The Board has added, ''we will ordinarily not infer a waiver of the right to bargain over a particular mandatory subject of bargaining from a contract clause couched in general terms.'' *Register Guard*, 301 NLRB 494 at 495 (1991). A waiver by contract may be found where the language in question is sufficiently specific. *Johnson-Bateman Co*., 295 NLRB 180, 189–190 (1989).

A waiver can also occur by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two. See *United Technologies Corp*., 274 NLRB 504, 507 (1985).

Examining the language of the paragraph of the March 16, 1990 agreement asserted to contain the waiver, it is apparent it consists of two parts, which, read together, are in conflict and thus ambiguous. In the first part, the parties agree that the underlying agreement as modified by the previous memorandum of understanding (containing the lump-sum obligation) survives and is incorporated here unless modified below. In the substantive terms of the March 16 memorandum, no modification is made of the lump-sum bonus and it thus survives and is incorporated in the new March 16, 1990 memorandum. In the second part the parties agree this agreement satisfies all previous obligations arising under the parties previous collective-bargaining agreements. Under one interpretation, this provision would nullify the bonus obligation. Yet, read together they cannot be reconciled and this can hardly be said to provide clear and convincing language of a waiver.

Furthermore, the language referring to satisfying ''all previous obligations'' fail to specify whether it cancels, in particular those obligations like the bonus which accrued on March 1, 1990, before the March 16, 1990 effective date of the memorandum and thus were fully earned and matured by that latter date, or only those future obligations which would have been effective between March 16, 1990, and January 4, 1991, such as wage increases and fund contributions. It is clear these future obligations under the 1988 agreement were modified in the March 16 memorandum of agreement, but the lump-sum bonus which had accrued was not.

That the Union from the outset did not deem the March 16, 1990 memorandum language a waiver of the right of the employees it represented is clear from its mailgram demand made of Flatbush on April 12 within a month of the effective date of the alleged waiver.

Respondents who have the burden of proof of the waiver which it asserts as an affirmative defense have failed to adduce any evidence relating to the contemporary negotiations, bargaining history, or past practices, which support a clear and unmistakable waiver. I do not deem its May 3, 1990 memorandum to employees as providing such support. The fact that the Union considered increases in fund contributions its first bargaining priority does not warrant the conclusion that the Union was thereby willing to forego earned bonuses for its unit employees to achieve that objective. The evidence is lacking for any such finding.

The documentary evidence there is surrounding the 1990 relationship between the parties, which terminated early the following year, shows a somewhat distrustful and noncooperative relationship, in which the Union asserted various rights to moneys and information and sought to conduct audits and the Respondents asserted, inter alia, that the operator of the Brooklyn facility had no contractual obligations to the Union which represented its employees. Under such circumstances, Respondents would be hard pressed to show a voluntary relinquishment of a bonus whose payment was already overdue when the March 16, 1990 memorandum was executed.

I conclude that no waiver of the claim to the lump-sum bonus payment has been established and the Respondents' failure to make the payments constitute a violation of their bargaining obligation arising under Section 8(a)(1) and (5) of the Act, *Nedco Construction Co*., 206 NLRB 150 (1973); *Oak Cliff-Golman Baking Co*., 207 NLRB 1063 (1973).

Respondents nonetheless assert that the Regional Director erred in not dismissing the charge alleging the refusal to make the lump-sum bonus payment because of the Union's failure to arbitrate the underlying dispute. While it was appropriate for the Regional Director to have deferred the charge to arbitration, as he did on June 5, 1990, when it was the only outstanding charge, once the other charges were filed, alleging, inter alia, a failure to provide information, which is not subject to the contractual grievance arbitration procedure, and the failure to remit fund contributions, as to which no deferral defense has been asserted, and the Union ceased to be the unit employees' bargaining representative, it was appropriate for the Regional Director to reevaluate his earlier deferral ruling.

The issuance of complaint on the issue and its consolidation with the two companion charges was done in accordance with the General Counsel's longstanding policy not to defer a matter to arbitration when, although a complaint allegation could have been deferred to the parties' grievance and arbitration machinery, other allegations, like the instant failures to produce information which are not deferrable and must be determined by the Board, have a close interrelationship. In such circumstances, as the Board has noted and determined, there is no compelling reason for deferring one aspect of the dispute to the grievance-arbitration machinery. *George Koch Sons, Inc*., 199 NLRB 166 (1972); *S.Q.I. Roofing*, 271 NLRB 1 fn. 3 (1984). The Board's recent decision in *Clarkson Industries*, 312 NLRB 349 (1993), in which the Board reversed the judge and found that issues concerning alleged unilateral changes should be deferred to the parties' grievance-arbitration procedures is distinguishable. There, unlike the situation here, the Board found these deferrable issues were not in any way factually or legally interrelated with the issues presented by an alleged threat and alleged discriminatory discipline as to which, because of contractual limitations on an arbitrator's authority to fashion an appropriate remedy, deferral was not warranted. Thus, the Union's failure to proceed to arbitration on the bonus payment issue is no defense to the Board's determination of that issue in the instant consolidated proceeding.

With respect to Respondents' failure to make payment of the contractual fund contributions, it is well settled that any unilateral change made by an employer during the course of a collective-bargaining relationship concerning matters which are mandatory subjects of bargaining are a per se refusal to bargain. See *NLRB v. Katz*, 369 U.S. 736 (1962). To the extent Respondents were obligated under the terms of their collective-bargaining agreement with the Union to make monetary contributions to the Union's Welfare Trust Fund and Prepaid Legal Service Care Fund on behalf of their employees in the bargaining unit their failure to make those contributions constitute violations of Section 8(a)(1) and (5) of the Act. It is clear that Welfare Fund contributions are a mandatory subject of bargaining. *Capitol City Lumber Co*., 263 NLRB 784 (1982). By failing and refusing to make those contributions, the Respondents invaded the Union's ''statutory right as a collective-bargaining representative of employees in the unit to bargain about any changes in the terms and conditions of employment for each employee'' in violation of the Act. *C & C Plywood Corp*., 148 NLRB 414, 415 (1964), affd. 385 U.S. 421 (1967), reversing 351 F.2d 224 (9th Cir. 1965).

Just as welfare benefits provided by the Union's Trust Fund were a part of the employees' terms and conditions of employment, and therefore mandatory, so too the legal services provided by the Prepaid Legal Service Care Fund were a term and condition of employment of the employees covered by the collective-bargaining agreement. While my research has failed to uncover a fully litigated Board decision dealing with such a benefit, by virtue of Pub. L. 93-95, August 15 1973, Section 302(c)(8) was added to Section 302 of the Labor Management Relations Act, removing the restrictions on employer payment to any representative of his employees or to any labor organization, with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice, provided certain requirements regarding the fund, in-

cluding a written agreement, equal representation in the administration of the fund, and the like apply. There is no evidence, and Respondents do not claim, that the legal fund fails to meet Section 302 requirements. Accordingly, group fringe benefits covering legal services, just like pooled vacation, holiday, severance, or similar benefits, among others, may be provided in collective-bargaining agreements and become enforceable obligations, for which the contracting employers, like the Respondent here, may be held liable under the Act for their failure to make the contractual contributions. See *Catalina Corp*., 303 NLRB No. 110 (July 18, 1991) (not published in Board volumes).

It is no defense to a finding of these violations to show that payments were finally made, acceptable to the Union, following the institution of a lawsuit to collect the same almost 2 full years after the last payments would have been made. The substantial sums due and owing here, the inordinate delay in making the contractual payments, and the fact that even then they were not made voluntarily, evidences a repudiation of the statutory and contractual obligation such that a finding of violation is clearly warranted here. See *Nick Robilotto, Inc*., 292 NLRB 1279 at fn. 4 (1989), and *Northeast Truck Center*, 296 NLRB 753 at 757 (1989).

As to the Respondents' refusal to permit an audit of its books and records or to furnish the contracts for labor services and information regarding ownership of the facility or the names and addresses of unit employees, the evidence shows Respondents failed to comply with these requests.

It is well established that an employer must provide the union which represents its employees in a collective-bargaining relationship with requested information which is necessary and relevant to the performance of its role as collective-bargaining representative. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967). *Acme* emphasized the importance of information relevant to the union in its efforts to police and administer the collective-bargaining agreement. It also endorsed the ''discovery type standard'' applied by the Board. *NLRB v. Yawman & Erbe Mfg. Co*., 187 F.2d 947, 949 (2d Cir. 1951).

The Union requested the audit to determine whether the proper remittance of dues and initiation fees were being made under the union-shop article of the collective-bargaining agreement in the 1982 agreement and incorporated in all successive agreements. There can be no question that the information the Union sought by the audit was in aid of its rights to enforce the union-shop clause of the agreement and thus necessary and relevant to its role as collective-bargaining representative. Respondent Flatbush's response was that it had no contractual relation with the Union—it did not respond to the merits of the request itself. However, by placing all responsibility on its labor contractor and avoiding any for itself, Respondents placed in issue the relationship between them and the ownership of the Brooklyn facility. Thus, Union Counsel Greenspan was well within the parameters of the Board's standard for relevance in seeking information as the contractual relationship with Flatbush's labor service contractor Fair and the ownership of the Brooklyn facility. If Fair and Flatbush were so intertwined as to constitute a single or joint employer then all obligations due under the collective-bargaining agreement would be the responsibility of both identities, and the facts regarding their relationship would be in aid of the Union in carrying out its statutory duties and responsibilities. See *Herbert Industrial Insulation Corp*., 312 NLRB 602 (1993), and *Barnard Engineering Co*., 282 NLRB 617 (1987). Whether or not the facts showed such a relationship, clearly by denying its own responsibility and placing all on its labor contractor, Respondent Flatbush made its relationship with Fair a relevant area of inquiry for the Union. It should be noted that the Board did ultimately find single-employer status.

Finally, the statutory duty to provide information clearly encompasses the Union's request for a list of employee names and addresses for the previous 6 months. Not only did the agreement specifically mandate the Employer to provide such an updated list, see *Commercial Property Services*, 304 NLRB 134 (1991), but such information has been found by the Board to be necessary and relevant to the Union's function as the unit employees' collective-bargaining representative. *Phoenix Co*., 274 NLRB 995 (1985). In the absence of any showing by Respondents rebutting the presumption of relevance, such information concerning the bargaining unit itself is presumptively relevant and will be ordered disclosed. *E. I. Dupont & Co. v. NLRB*, 744 F.2d 536 (6th Cir. 1984). Given the outstanding dispute involving missed fund payments, and the union business representative's suspicions as to whether there had been proper reporting of all unit employees in the documents accompanying Respondents' remittance of moneys to the Union under the contract, the record independently establishes a high degree of actual relevance to the Union's request for the employees names and addresses.

CONCLUSIONS OF LAW

1. Respondents Flatbush and Fair constitute a single-integrated business enterprise and a single employer, within the meaning of the Act, and each of them are now, and have been at all times material, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and heath care institutions within the meaning of Section 2(14) of the Act.

2. 1115 Nursing Home and Service Employees Union, Division of 1115 District Council, AFL–CIO is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. All all times material, until on or about January 3, 1991, the following employees of Respondents constituted a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All employees employed at Respondents' Brooklyn facility, excluding registered nurses, confidential, office and clerical employees, supervisors, watchmen and guards.

4. At all times material, until on or about January 3, 1991, the Union by virtue of Section 9(a) of the Act, was the exclusive representative of the employees in the unit described above in paragraph 3, for the purposes of collective-bargaining with respect to their rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. By failing and refusing to make the contractually required lump-sum bonus payments to their blue collar employees who were employed by them during the period from October 29, 1989, through February 28, 1990, by failing and

refusing to remit the full amount of the contractually required contributions to the 1115 Union Welfare Trust Fund from on or about April 1 to August 31, 1990, and by failing and refusing to remit any contractually required contributions to the 1115 Union Welfare Trust Fund and to the 1115 Prepaid Legal Service Care Fund from on or about September 1, 1990, until January 3, 1991, without prior notice to Local 1115, and without affording Local 1115 an opportunity to bargain with Respondents with respect to this conduct; and by failing and refusing to permit Local 1115 to audit their books and records for the purpose of ascertaining whether the proper dues and initiation fees had been remitted to Local 1115; and by failing and refusing to furnish Local 1115 pursuant to its requests, with the contract under which the labor services contractor, Respondent Fair, performs work and detailed information concerning the ownership of the Brooklyn facility and the subcontractor, and the names and addresses of all employees covered by the collective-bargaining agreement for the last 6 months preceding its request, Respondents have failed and refused, and are failing and refusing, to bargain collectively and in good faith with Local 1115, and have thereby been engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondents have each engaged in certain unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that they each cease and desist therefrom and take certain affirmative actions which are necessary to effectuate the policies of the Act. I shall recommend that Respondents be ordered to pay each of the blue collar employees in the bargaining unit employed by them during the period from October 29, 1989, through February 28, 1990, the lump-sum bonus payment required to be paid pursuant to the 1988 memorandum of agreement with Local 1115, with interest thereon as computed in *New Horizons for the Retarded*, 283 NLRB 1172 (1987).

Inasmuch as Local 1115 ceased representing the bargaining unit after January 3, 1991, and all of the moneys due and owing the Local 1115 Trust Funds under the collective-bargaining agreements have been paid, I shall not recommend that Respondents cease and desist from refusing to bargain on request, bargain in good-faith with, Local 1115, nor shall I recommend that Respondents make the requisite payments which the respective Trust Funds have already received.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondents, Flatbush Manor Care Center and Fair Management Consulting Corp., Brooklyn, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the certified or duly designated exclusive bargaining representative of all of their employees employed at their Brooklyn facility, excluding registered nurses, confidential, office and clerical employees, supervisors, watchmen and guards, by unilaterally, and without prior notice to, or having afforded, the said representative an opportunity to bargain, failing and refusing to make contractually required lump-sum bonus payments, and to remit contractually required contributions to the representative's trust funds, and by failing and refusing to permit an audit of their books and records and to furnish information both of which are necessary and relevant to the performance of the representative's role as collective-bargaining representative of our employees in the unit described.

(b) In any like or related manner restraining or coercing employees in the exercise of rights the guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pay to each blue collar employee in the bargaining unit described above, employed by them during the period from October 29, 1989, through February 28, 1990, the lump-sum bonus payment required to be paid pursuant to the 1988 memorandum of agreement with 1115 Nursing Home and Service Employees Union, Division of 1115 District Council, AFL–CIO in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Brooklyn, New York facility copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 29, after being duly signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Employers have taken to comply.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with the certified or duly designated exclusive bargaining representative of all our employees employed by us at our Brooklyn facility, excluding registered nurses, confidential, office and clerical employees, supervisors, watchmen and guards, by unilaterally, and without prior notice to or having afforded the said representative, an opportunity to bargain, failing and refusing to make contractually required lump-sum bonus payments, and to remit contractually required contributions to the said representative's trust funds, and by failing and refusing to permit an audit of our books and records and to furnish information both of which are necessary and relevant to the performance of the representative's role as collective-bargaining representative of our employees in the unit described.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of our employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL pay to each blue collar employee in the bargaining unit described above, employed by us during the period from October 29, 1989, through February 28, 1990, the lump-sum bonus payment required to be paid pursuant to the 1988 memorandum of agreement with 1115 Nursing Home and Service Employees Union, Division of 1115 District Council, AFL–CIO together with interest thereon.

FLATBUSH MANOR CARE CENTER AND FAIR MANAGEMENT CONSULTING CORP.